142

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No. 09-162

Supreme Court, U.S.
FILED
OCT 9 - 2009
OFFICE OF THE CLERK

In The

Supreme Court of the United States

MICHAEL JAMES PERRY,
Petitioner,

v.

RICK THALER,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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This is a capital case.

QUESTIONS PRESENTED

This case presents the following questions for review:

1. Was the court of appeals required to make explicit reference to the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (ABA Guidelines) in evaluating Perry's ineffective-assistance-of-counsel claim?

2. Could reasonable jurists debate whether Perry received effective assistance of counsel where his attorneys procured relevant evidence concerning Perry's biological background, purported mental illnesses, and possible drug and alcohol abuse, but did not receive some information until after jury selection had begun?

3. Could reasonable jurists debate that Perry's attorneys' strategy for presenting his drug and alcohol abuse to the jury did not constitute ineffective assistance of counsel?

4. In light of the fact that there was no previous diagnosis of bipolar disorder in Perry's medical history and no suggestion by Perry's psychologist that he suffered from such a condition, could reasonable jurists

debate that Perry's attorneys did not perform ineffectively by not having Perry tested for bipolar disorder?

5. Does Perry's assertion that the court of appeals applied deference to a non-existent strategy in evaluating his ineffective-assistance-of-counsel claim misinterpret the lower court's decision?

6. Could reasonable jurists debate the lower court's decision that there was no violation of *Brady*[1] or *Giglio*[2] when the State did not inform the defense that it had told Victor Neal, a former roommate of Perry's who testified against him, that he could not be prosecuted because he was not a participant in a crime?

7. Was the court of appeals "slavishly deferential" in affirming the state court's finding that there was no agreement between the State and Neal?

8. Assuming *arguendo* that the prosecution was obligated under *Brady* to disclose their purported agreement with Neal, was this evidence material at punishment in light of the overwhelming evidence

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[1] *Brady v. Maryland*, 373 U.S. 83 (1963).

[2] *Giglio v. United States*, 405 U.S. 150 (1972).

presented by the State and Perry's confession that he had helped kill two other individuals in addition to the victim (among them the victim's son)?

9. Could reasonable jurists debate that Perry's "as-applied" *Penry*[3] challenge to the Texas mitigation instruction is unexhausted and procedurally defaulted?

10. Did the lower court properly hold that, since Perry did not raise an "applied challenge" to the Texas mitigation instruction until he moved for a certificate of appealability (COA) in the circuit court, the Director could not have possibly waived exhaustion in the district court?

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[3] *Penry v. Lynaugh*, 492 U.S. 302 (1989)

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES vii

JURISDICTION 1

STATEMENT OF THE CASE 1

I. Facts of the Crime 1

II Evidence Relating to Punishment 6

III. Direct Appeal and Postconviction Proceedings 12

REASONS FOR DENYING THE WRIT 13

I. Certiorari Review of Perry's *Strickland* Claim Is Not Warranted. 14

A. The court of appeals was not required to explicitly refer to the ABA Guidelines in its opinion. 17

B. Reasonable jurists could not debate that counsel did not perform ineffectively in securing Perry's adoption records and presenting Perry's mitigating evidence. 18

C. Reasonable jurists could not debate that counsel did not perform ineffectively by not having Perry tested for bipolar disorder 20

D. The lower court's decision is not contrary to *Rompilla*. 21

TABLE OF CONTENTS, Cont'd

E. Perry's assertion that the court of appeals deferred to a non-existant strategy misstates and misinterprets the court of appeal's decision. 22

II. Reasonable Jurists Could Not Debate That the Lower Courts Properly Denied Perry's *Brady* claim. 23

A. Perry's assertion that the court of appeals held that there was no *Brady* violation because there was no immunity agreement between Neal and the State is incorrect 24

B. There were no inducements offered to Neal for his testimony and thus nothing to disclose under *Brady*. 25

C. Even if the State had a disclosure obligation under *Brady*, the allegedly suppressed evidence was not material. 27

IV. Perry's "Applied Challenge" to Texas's Mitigation Instruction Is Unexhausted and Procedurally Defaulted. 28

A. This claim was never presented to the state court. 28

B. The Director did not waive the exhaustion defense with respect to Perry's "applied challenge" to Texas's mitigation instruction. 29

C. In the alternative, this claim is meritless. 31

TABLE OF CONTENTS, Cont'd

Page

CONCLUSION 33

TABLE OF AUTHORITIES

Cases	Page
Anderson v. Harless, 459 U.S. 4 (1982)	28
Banks v. Dretke, 540 U.S. 668 (2004)	24
Beazley v. Johnson, 242 F.3d 248 (5th Cir. 2001)	32
Bell v. Cone, 535 U.S. 685 (2002)	19
Brady v. Maryland, 373 U.S. 83 (1963)	*passim*
Coleman v. Thompson, 501 U.S. 722 (1991)	28
Dowthitt v. Johnson, 230 F.3d 733 (5th Cir. 2000)	21
Giglio v. United States, 405 U.S. 150 (1972)	2
Miller-El v. Cockrell, 537 U.S. 322 (2003)	13, 14, 25
Nobles v. Johnson, 127 F.3d 409 (5th Cir. 1997)	28, 29
Penry v. Johnson, ("Penry II"), 532 U.S. 782 (2001)	32
Penry v. Lynaugh, 492 U.S. 302 (1989)	3, 29
Picard v. Connor, 404 U.S. 270 (1971)	28
Ransom v. Johnson, 126 F.3d 716 (5th Cir. 1997)	15
Rector v. Johnson, 120 F.3d 551 (5th Cir. 1997)	20
Riley v. Cockrell, 339 F.3d 308 (5th Cir. 2003)	16
Roach v. Quarterman, 220 Fed. App'x 270 (5th Cir. 2007)	32
Rompilla v. Beard, 545 U.S. 374 (2005)	*passim*
Slack v. McDaniel, 529 U.S. 473 (2000)	13, 14
Strickland v. Washington, 466 U.S. 668 (1984)	*passim*
Strickler v. Greene, 527 U.S. 263 (1999)	24

TABLE OF AUTHORITIES, continued

Cases Page

United States v. Agurs, 427 U.S. 97 (1978) 24

United States v. Bagley, 473 U.S. 667 (1985) 24

Wiggins v. Smith, 539 U.S. 510 (2003) . . . . . *passim*

Vega v. Johnson, 149 F.3d 354 (5th Cir. 1998) 29

Williams v. Taylor, 529 U.S. 362 (2000) 17

Constitutions, Statutes and Rules

28 U.S.C. §§ 2241 1

28 U.S.C. § 2253(c)(1)(A) 13

28 U.S.C. § 2253(c)(2) 14

28 U.S.C. § 2254(d) . . . . . *passim*

28 U.S.C. § 1254(1) 1

Texas Code of Criminal Procedure Article 37.071 Section 2(f)(4) 32

Michael James Perry is a death-sentenced Texas inmate who unsuccessfully challenged his presumptively valid state capital-murder conviction and sentence of death pursuant to 28 U.S.C. §§ 2241 and 2254. Perry now seeks certiorari review of the Fifth Circuit Court of Appeals's decision that denied him a COA on his claims. But this Court should refuse certiorari because, as demonstrated below, Perry fails to present any issues worthy of this Court's attention.

JURISDICTION

Perry invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

I. Facts Of The Crime

At the scene of his arrest on October 30, 2001, Perry was approached by Detective Carey Mace as he lay on a gurney in an ambulance. 15 RR[1] 312, 16 RR 86, 87, 88, 92, 93-94. Bonnie Montgomery, a paramedic, Sergeant Sidney Blair, and Lieutenant David Moore, all stood outside the ambulance's open doors. 15 RR 166, 293, 308-309; 16 RR 48, 51, 58. After Detective Mace introduced himself, Perry said, "I know it's the needle and I want to save everybody the trouble and just confess." 16 RR 95. Perry also stated, "I know I have a lawyer, but I am going to save us both a lot of time." *Id.*

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[1] "R" refers to the record on appeal. "CR" refers to the clerk's record of documents on file with the court in Perry's trial. "RR" refers to the reporter's record of transcribed trial proceedings. "SHCR" refers to the clerk's record of documents on file with the court in Perry's state habeas proceedings. All references are preceded by volume number and followed by page number where applicable.

at 60. Detective Mace interrupted Perry and gave him his *Miranda* warnings, which Perry waived. *Id.* at 96. Perry then recounted the details of the instant offense which—along with an audio-taped interview at the hospital—were reduced to a written statement. *Id.* at 60, 98, 102, 116, 120, 147. At trial, this redacted[5] version was read to the jury:

> Last week, the week of October 22-26, my friend, Jason Burkett, and I decided we needed to get a vehicle, or two vehicles. We both know a younger white male, known to us as Adam Stotler whose parents have a lot of money. They also have a newer Camaro and Isuzu Rodeo.
>
> On Wednesday 10-24-01 Jason and I made a plan that we were going to ask to spend the night with Adam at his house, and we were going to take the Camaro in the middle of the night while Adam and his mom was sleeping. We went to Adam's house at about 7 pm on Wednesday 10-24-01. Jason was driving his girlfriend, Kristin Ranel's, blue Chevy truck, and I was riding in the passenger seat. We had a 12 gauge shotgun with us. Jason and I got to Adam's house, and his mom told us that Adam was not home, that he was at the skate park and

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[5] In his confession, Perry also implicated himself in the subsequent murders of Sandra's son, James Adam Stotler (Adam), and Adam's friend, Jeremy Richardson. But Perry was only tried for murdering Sandra, so the portion of Perry's confession relating to the murders of Adam and Jeremy was redacted at guilt-innocence and only read at punishment. *See* Statement of the Case, Section II ("Facts Relating to Punishment"), *infra*.

would be home around 9 pm.

Jason and I left in the truck, but before we got out of the subdivision, Jason said that it would be easier to get the car with only one person home. Jason and I then made a plan that Jason would knock on the front door, and I would sneak in the back door, through the garage with the shotgun. We went to Adam's house on foot and left Kristen's [sic] truck down the road. I walked around to the side of the house through the garage, and Jason knocked on the front door and asked to use the phone. When I heard Jason talking on the phone, I went into the house through the back door in the garage. Once in the house, I hid in the laundry room between the kitchen and garage. I then knocked on the back door, and when Adam's mom came to the back door, I shot her one time in the side near her back with the shotgun. She fell to the floor, and I dropped the shotgun.

She then moved or tried to get up or something, and I grabbed the shotgun and shot her one more time. She fell to the floor in front of the laundry room and garage, back door. Jason freaked out and ran to the front door and opened the door. We calmed down a little and grabbed the blankets and sheet off of the bed in the bedroom near the kitchen and put the blankets and sheet over her because we did not want to look at her. Jason ran and got Kristen's truck and brought it back to Adam's house. Jason

> backed the truck into the garage, and we dragged Adam's mom's body and the blankets out into the garage, where we loaded her into the back of the truck with the blankets and sheet. I could not find the keys to the Camaro, and I remembered that the inspection sticker was expired, and Adam's mom never drove it.
>
> Jason then got into the drivers side of the truck and I got in the passenger seat, and Jason drove to an area he called Crater Lake. I did not know where Crater Lake was, but I remember driving down a dirt road, then going across a big bump and seeing some type of pipeline or something. We then drove down a cleared road and saw an old stripped out truck blocking the road. The road to what Jason called Crater Lake was off to the left of the stripped truck. Jason turned the truck around and first tried to open the tailgate, speed backwards toward the pond, and try to slam on the brakes to get the body to slide out. He did that I think twice, but it would not work so we grabbed her body, and we rolled her down into the water. Jason and I then threw the sheets into the water on top of her and covered her up with some sticks and brush we found near by.
>
> [. . .]

21 RR at Exhibit 129 (paragraphs added); 16 RR 150-53.

Later that evening Perry and Jason drove to a club called Nite Life in Sandra's Camaro. 16 RR 189, 191,

192, 193. They told their friends that they had won $7,000 on "a scratch off ticket" and purchased the vehicle. 16 RR 194. Jason drove a white Isuzu Rodeo to Nite Life later that night. *Id.* at 194.

The next day, Thursday, October 25, 2001, Perry and Jason went to get their bodies tattooed and pierced. *Id.* at 210, 247. Perry told the tattoo shop owner that "he had killed someone and took the vehicles." *Id.* at 200, 201, 212.

On Friday morning, October 26, 2001, Detective Morast attempted to stop Perry for committing several traffic violations. 15 RR 214, 216-17, 218, 222, 226; 16 RR 89. Perry led Detective Morast on a high-speed chase, then wrecked the Camaro. 15 RR 223, 225, 226. Perry jumped out of the driver's door and fled on foot. *Id.* at 226. Perry was later arrested, booked in jail, and bonded out as Sandra's son, Adam. 15 RR 229, 230; 16 RR 90, 249, 283, 284.

On Saturday, October 27, 2001, a recreational fisherman found Sandra's decomposing body in Crater Lake. 15 RR 29, 30, 35, 101; 16 RR 88. The DNA profile derived from blood recovered in the bed of Kristin Willis's truck matched Sandra's DNA profile. 16 RR 156; 17 RR 71. A spent shotgun casing was recovered on the floor of the laundry room of Sandra's home that matched the shotgun recovered at the scene of Perry's arrest. 15 RR 145, 169; 20 RR at Exhibit 64A; 17 RR 47.

On Monday, October 29, 2001, the Conroe Courier reported in a front page story, "Body Found in Crater Lake." 16 RR 21-22, 23, 24; 20 RR at Exhibit 96. Perry called someone on the phone and told that person "they had made the front page." 16 RR 25.

Approximately 5:00 a.m. on Tuesday morning,

October 30, 2001, Montgomery County Sheriff's Corporal Howard Lee Smith III found Perry, Jason, and Aaron Davidson in the white Isuzu Rodeo at a truck stop. 15 RR 242, 244, 245, 246-67. The vehicle hit Corporal Smith in the course of fleeing, but Corporal Smith managed to shoot out the back passenger tire. *Id.* at 254. The vehicle crashed inside a nearby store. *Id.* at 255. Perry and Jason, toting a shotgun, climbed a fence and ran to a nearby apartment complex where police subsequently arrested them. 15 RR 299, 301; 16 RR 279; 17 RR 46-47, 128, 132.

Against the advice of counsel, and after receiving oral and written admonishments, Perry testified in his defense. 18 RR 36-43, 49-95; 4 CR 588. Perry testified that his prior statements to Detective Mace were untrue. 18 RR 82. Perry stated that at the time of his arrest he had been drinking and taking pills, was nervous and scared, and had simply told Mace what he wanted to hear. *Id.* at 83-85. Perry further testified that he requested a lawyer, but received no response. *Id.* at 92.

II. Evidence Relating To Punishment

During the punishment phase of the trial, the redacted portion of Perry's confession was read to the jury:

> We picked up Kristen and drove back to Adam's subdivision. Jason drove, Kristen sat in the middle, and I sat on the passenger's side. We still had the shotgun with us. When we got to the subdivision, we could not get in, because we did not know the gate code. We knew that Adam would be home soon so we waited at the gate, and Adam pulled up in the white

Isuzu Rodeo with another guy I know as Jeremy in the passenger seat. While Jason, Kristen, and I waited at the gate for Adam, we agreed on a story to tell Adam. Jason and I told Adam and Jeremy that a friend of ours had shot himself while we were all hunting squirrels, and we needed their help to get him.

We left the front of the subdivision and turned right onto the road in front of the subdivision. We were still in the truck, and Adam and Jeremy followed us in the Isuzu Rodeo. We then came to a stop sign and turned right. We then took the first left off of that road and crossed the railroad tracks. We drove down a dark, winding road and stopped at I think was the first dirt road on the left. We all parked there, and Jason, Jeremy, Adam, and I started walking back into the woods off the dirt road. Kristen sat in her truck. After we walked awhile, Adam realized where we were and said that he knew an easier way to get to our friend.

Adam and I went back to Adams [sic] Isuzu, and Jason and Jeremy stayed in the woods. Adam drove me in his Isuzu to the 1st subdivision on the left off of the same road we were on. Adam said that there was a road that went into the area we had earlier walked to. I think we turned onto the first road on the left in that subdivision and stopped at a cul-de-sac.

Adam and I got out of the Isuzu and we saw Jason walking toward us with the shotgun.

> Jason asked if we heard the gunshots and said that he was trying to let us know where he was. I told him that I had heard two to three shots. Adam then walked toward Jason, who did not have Jeremy with him, and Jason told him that he (Jason) would take Adam to where the others supposedly were. I walked back to get my cigarettes, and I saw Jason shoot Adam in the left side. I then covered my eyes. I heard a second gunshot and uncovered my eyes. I then saw Jason lean in close to Adam and fire a third shot at close range. I walked over to Adams [sic] body and got his car keys out of his pocket.
>
> [. . .]
>
> I also took Adam's wallet out of his Isuzu with his driver's license.

23 RR 29-32; 28 RR at Exhibit 149 (paragraphs added).

Detective Mace first learned that Adam and Jeremy were dead when Perry talked to him in the ambulance. 23 RR 20. Police found the decomposing bodies of Adam and Jeremy "almost precisely where" Perry described. *Id.* at 24. Both Adam and Jeremy died of multiple shotgun wounds. *Id.* at 142.

The evidence also showed that the night before his arrest, Perry put a loaded shotgun to Jason's girlfriend's head and said, "I have already killed somebody, it's not going to hurt me to kill anyone else." *Id.* at 257, 259, 263, 276.

On May 22, 2001, police arrested Perry for deadly conduct after shooting at a house. 24 RR 204-05, 208.

Perry later told his girlfriend, "he done a drive-by on the Latin Kings and he was getting away from them." *Id.* at 188.

At the end of first grade, when he was eight years old, Perry was diagnosed as having Attention Deficit Disorder (ADD). 26 RR 17, 18. At the end of the seventh grade, Perry was diagnosed with "oppositional defiant disorder." *Id.* at 28. At the end of the eighth grade, Perry was diagnosed with "conduct disorder." *Id.* at 28. "Antisocial personality disorder" is the adult form of these disorders. *Id.* at 260. Although he was twice admitted to a mental hospital, Perry tested negative for bipolar disorder [*Id.* at 31] and did not qualify as learning disabled for special education classes in elementary school. 26 RR 224-225. Perry received A's and B's in the first quarter at Mandeville High School. *Id.* at 23, 24, 25. Perry has an IQ of 97, and he was an average student. 25 RR 230; 26 RR 213.

In junior high, Perry stopped going to school and would run away from home and come back when he felt like it. 26 RR 28. Perry stole his mother's jewelry and tried to pawn it [18 RR 132; 26 RR 63], stole his parent's van and ran it into a mailbox [26 RR 29], and broke into a neighbor's home and tore the wallpaper and whittled the moldings [*Id.* at 29.]. During this same time period, Perry received counseling from psychologists and psychiatrists. *Id.* at 31.

After Perry was "kicked out" of an "outbound class" in Florida, Perry's parents filed charges against Perry, and he was "determined adjudicated and court-ordered to attend a long-term facility for health care." *Id.* at 30. In September 1997, Perry was sent to Father Flanagan's Boys Town in Nebraska. *Id.* at 30, 32, 55, 68, 70-71. Three months after his arrival, Perry threatened his

house parent, "You know, you people work here. I don't know why you work here. People like me who are going to rape or kill your kids, you know." 24 RR 97, 104-05, 109. Perry was promptly sent to the locked facility at Boys Town for four months. *Id.* at 105, 109, 117. Perry did not have the level of depression or any DSM-IV disorder to warrant the mental health care provided at the facility. *Id.* at 106-07.

In March 1999, Perry yelled at his history teacher in front of the class, "Fuck you, bitch, suck my balls." *Id.* at 131-32, 133. When Perry refused to apologize, Perry was given four days to leave Boys Town. 24 RR 134-35; 26 RR 35.

Perry's parents, fearing that they would not be able to control Perry, sent him to Casa by the Sea, a secured high school campus in Mexico. 25 RR 211, 213, 214; 26 RR 71, 72. Perry graduated from high school, but not from the program at Casa by the Sea, leaving on his eighteenth birthday. 18 RR 57, 59; 25 RR 220.

Except for four to six months in the Job Corps, four months in Houston, and a brief stay with his parents, Perry was essentially homeless after leaving Casa by the Sea. 18 RR 60, 68, 69; RR-26 45-46. Perry stayed for short periods with acquaintances and in shelters. 18 RR 60-62, 69-70; RR-24 188, 202, 244. Moreover, except for four to six months in the Job Corps [18 RR 60; 26 RR 45], laying tile in Houston [26 RR 45], and a month at Wal-Mart [18 RR 69], Perry remained jobless after leaving Casa by the Sea. 24 RR 195, 219. To support himself and procure alcohol and pills, Perry stole and sold pills as wells as other items. *Id.* at 220, 221, 223. On October 2, 2001, police arrested Perry for presenting a fake prescription for 100 pills of Xanax. 24 RR 285, 286; 25 RR 7, 10, 11, 12.

Perry's mitigation evidence included testimony from his biological mother, Jeannie Valionas. 25 RR 113-53. Valionas related that she was sixteen when she became pregnant with Perry. *Id.* at 114. Valionas was "stoned and wasted every day around conception" and continued to use drugs and alcohol until a month or two before Perry was born. *Id.* at 125-26. Although Valionas was not certain who Perry's father was, all her friends used drugs and drank alcohol every day with her. *Id.* at 133. Nevertheless, at birth, Perry was a healthy, full-term baby—he was not placed in intensive care or in an incubator and had no obvious birth defects. *Id.* at 145-46. Valionas related a family history of depression, alcoholism, drug use, and thievery. 25 RR 117-18, 120, 137, 149, 151, 152. None of Perry's biological relatives had committed murder, however. *Id.* at 148.

Perry was also interviewed by Dr. Gilda Kessner, a clinical psychologist with a forensic specialty. 26 RR 79-80, 90. Dr. Kessner prepared a mitigation package of information for Perry. 26 RR 90. In Dr. Kessner's opinion, Perry's greatest risk factor for committing a future act of violence in the penitentiary was his age. *Id.* at 133. Dr. Kessner opined that if Perry could get through his first ten years in prison without initiating an act of violence, the likelihood of his becoming violent in prison would drop to zero. *Id.* at 133-34.

Yet, evidence showed that while in the Montgomery County Jail awaiting trial, Perry was "[v]ery unruly." 25 RR 86. Perry talked "a lot of trash" to other inmates and got them "riled up." *Id.* at 87. For taking a disciplinary sheet off another inmate's cell, Perry's excess books, allowed as a privilege, were taken away. *Id.* at 88, 89. Perry became belligerent, had to be restrained, and tried to bite the officer who was restraining him. *Id.* at

89, 90, 92, 93.

Dr. Quijano testified in rebuttal for the State. 26 RR 237-76. Dr. Quijano's opinion, Perry's behavior "would be better described by oppositional defiant conduct disorder, antisocial personality disorder and not [Attention Deficit Hyperactivity Disorder ("ADHD")]." Id. at 265.

With regard to this capital murder, Dr. Quijano opined that it was characterized by its planning and methodical execution. *Id.* at 246, 257. Moreover, Dr. Quijano noted that, in Perry's case, there was no remorse—after Perry shot Sandra, he repeated the action, then followed it with participating in two other murders. *Id.* at 259-60, 264.

III. Direct Appeal and Postconviction Proceedings

A Texas jury found Perry guilty of capital murder for intentionally and knowingly causing the death of Sandra Stotler in the course of committing the offense of burglary of a habitation. 4 CR 597; 19 RR 64. After hearing additional evidence on punishment, the jury answered "yes" to the first special issue, which asked whether Perry posed a continuing threat to society, and "no" to the second special issue, which asked whether there were sufficient mitigating circumstances to warrant a life sentence. 4-CR 604, 605; 27 RR 74-75. In accordance with statute, the trial court then sentenced Perry to death. 4 RR 606-09; 27 RR 75-76. The Texas Court of Criminal Appeals affirmed the judgment of the trial court. *Perry v. State*, 158 S.W.2d 438 (Tex. Crim. App. 2004). This Court refused Perry's petition for a writ of certiorari. *Perry v. Texas*, 126 S.Ct. 416 (2005).

Perry filed an application for a writ of habeas corpus pursuant to Article 11.071 of the Texas Code of

Criminal Procedure, alleging nineteen grounds for relief. 1 SHCR 7. Based on the convicting court's findings of fact and conclusions of law—as well as on its own review of the state court record—the Court of Criminal Appeals denied Perry's request for habeas relief. *Ex parte Perry*, Application No. 62,906-01 at Order (Tex. Crim. App. Mar. 26, 2006) (unpublished).

Perry also filed a petition for a writ of habeas corpus in federal district court. 1 R 6. The Director answered, asserting that Perry's claims were meritless and moving for summary judgment. 14 R 2618. The district court granted the Director's motion and denied Perry's petition for writ of habeas corpus. 15 R 2931. The district court also denied Perry a COA with respect to his claims. 16 R 3021.

The court of appeals likewise denied a COA and affirmed the judgment of the district court. *Perry v. Quarterman*, 314 Fed. Appx. 663, 2009 WL 613172 (5th Cir. 2009) (unpublished). The instant certiorari petition followed.

REASONS FOR DENYING THE WRIT

Perry argues the courts below erred in erred in denying him a COA with regard to the claims described above. Yet Perry's claims are without merit or foreclosed by precedent. Consequently, the court of appeals acted properly in denying a COA, and Perry's petition is unworthy of this Court's attention.

In the court of appeals, as a jurisdictional prerequisite to obtaining appellate review of the constitutional claims raised in Perry's federal habeas petition, Perry was required to first obtain a COA from the circuit court. 28 U.S.C. § 2253(c)(1)(A); *Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003); *Slack v. McDaniel*,

529 U.S. 473, 483 (2000). The standard to be applied in determining when a COA should issue examines whether a petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Miller-El*, 537 U.S. at 336; *Slack*, 529 U.S. at 483. Perry had to demonstrate "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack*, 529 U.S. at 484 (internal quotation marks and citation omitted); *see also Miller-El*, 537 U.S. at 336. Furthermore, the determination of whether a COA should issue must be made by viewing the petitioner's arguments through the deferential scheme set forth in 28 U.S.C. § 2254(d). *Id.* at 336 (noting that, in making a COA determination, "[w]e look to *the District Court's application of AEDPA* to petitioner's constitutional claims and ask whether *that* resolution was debatable amongst jurists of reason") (emphasis added). But Perry did not meet the standards for obtaining a COA because the arguments that he advances do not amount to a substantial showing of the denial of any constitutional rights. Thus, the court of appeals correctly denied a COA, and there are no compelling reasons for this Court to review his claims.

I. Certiorari Review of Perry's *Strickland*[6] Claim Is Not Warranted.

In his petition for certiorari, as he did in the lower courts, Perry asserts that trial counsel failed to properly investigate, develop, and present mitigation evidence concerning Perry's: (1) biological background; (2) alleged bipolar disorder, and (3) drug and alcohol abuse. Cert.

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[6] *Strickland v. Washington*, 466 U.S. 668 (1984).

Pet. at 15-18. The familiar two-prong standard by which a claim of ineffective assistance of counsel is weighed is set forth in *Strickland*. That is, to establish that counsel performed ineffectively, Perry must show both that his attorney's performance was deficient and the deficient performance prejudiced his defense. *Strickland*, 466 U.S. at 687. Furthermore, because a convicted defendant must satisfy both prongs of the *Strickland* test, a failure to establish either deficient performance or prejudice makes it unnecessary to examine the other prong. *Id.* at 697.

In order to establish that counsel's performance was constitutionally deficient, a convicted defendant must show that trial counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." *Id.* at 687. In so doing, a convicted defendant must overcome a strong presumption that trial counsel's conduct fell within a wide range of reasonable professional assistance, and every effort must be made to eliminate the "distorting effect of hindsight." *Id.* at 689. To render effective assistance, the Sixth Amendment requires counsel "to make a reasonable investigation of defendant's case or to make a reasonable decision that a particular investigation is unnecessary." *Ransom v. Johnson*, 126 F.3d 716, 723 (5th Cir. 1997) (citing *Strickland*, 466 U.S. at 691). When assessing effectiveness at the sentencing stage of a capital trial, counsel's "investigations into mitigating evidence should comprise efforts to discover all reasonably available mitigating evidence." *Wiggins v. Smith*, 539 U.S. 510, 524 (2003). "[C]ounsel should consider presenting . . . [the defendant's] medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences." *Id.* That is,

"[g]enerally accepted standards of competence require that counsel conduct an investigation regarding the accused's background and character." *Id.* When a convicted defendant argues that his counsel failed to adequately investigate mitigation evidence, the proper inquiry is "not whether counsel should have presented a mitigation case . . . [but] whether the investigation supporting counsel's decision not to introduce mitigating evidence of [the defendant's] background was itself reasonable." *Wiggins*, 539 U.S. at 523.

However, "any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution." *Strickland,* 466 U.S. at 692. In order to establish that he has sustained prejudice, Perry "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694. A reasonable probability is a probability sufficient to undermine the confidence in the outcome." *Id.* A mere allegation of prejudice is not sufficient to satisfy the prejudice prong of *Strickland*; rather, Perry must "affirmatively prove" prejudice. *Id.* at 693. With respect to errors at the sentencing phase of a death penalty trial, the relevant inquiry is "whether there is a reasonable probability that, absent the errors, the sentencer [] would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695; *see also Riley v. Cockrell*, 339 F.3d 308, 315 (5th Cir. 2003) (petitioner "has the difficult burden of showing a reasonable probability that the jury would not have imposed the death sentence in the absence of errors by counsel" (internal quotation marks omitted)).

A. The court of appeals was not required to explicitly refer to the ABA Guidelines in its opinion.

In the instant case, the court of appeals agreed with the district court that "counsel did extensive investigation into Perry's biological family, provided the jury with testimony regarding Perry's troubled background, and offered Dr. Kessner's evaluation and mitigation testimony." PA[7] 8. Nevertheless, Perry asserts that counsel's investigation did not comport with ABA Guidelines and that the court of appeals erred by not explicitly referring to those guidelines in its opinion. Cert. Pet at *i* (Question Presented No. 1), 16-18. But Perry's argument is clearly meritless, as this Court's precedent clearly holds that is not mandatory that a lower court explicitly refer to or apply the ABA Guidelines in evaluating an ineffectiveness claim. While it is true that this Court's decisions in *Strickland*, *Williams*[8], *Wiggins*, and *Rompilla*[9] all refer approvingly to the ABA Guidelines, the guidelines were not adopted as law. *Wiggins*, 539 U.S. at 524. As the Court explained in *Strickland*:

> In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. Prevailing norms of practice as reflected in American Bar Association standards and the like [] are

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[7] "PA" refers to the appendix attached to Perry's petition for certiorari, followed by page number.

[8] *Williams v. Taylor*, 529 U.S. 362 (2000).

[9] *Rompilla v. Beard*, 545 U.S. 374 (2005).

> guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.

Strickland, 466 U.S. at 468-89 (citations omitted).

Consequently, the lower court's decision was not in error simply by virtue of the fact that it did not explicitly refer to the ABA Guidelines.

B. Reasonable jurists could not debate that counsel did not perform ineffectively in securing Perry's adoption records and presenting Perry's mitigating evidence.

While Perry acknowledges counsel did actually unseal and secure his adoption records, Perry contends counsel should have procured the records earlier. Cert. Pet. at *i-ii* (Question Presented No. 2), 16-17. Perry believes that if counsel had obtained the records earlier, counsel could have used the records to find additional instances of instability and mental illness in Perry's biological family.[10] *Id.* Perry further argues that counsel's strategy for presenting Perry's mitigating evidence was fatally flawed because counsel "did not put [his history of drug and alcohol abuse] into context with [Perry's] mental illness and hereditary pre-disposition."

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[10] These instances derive from the report of a mitigation specialist rather than authenticated firsthand accounts. Observing that this report was merely a "recitation of hearsay statements," the district court found that "Perry has made no effort to provide reliable or admissible testimony about his family background." 15 R 2992.

Id. at ii (Question Presented No. 3), 22-25. The court of appeals determined that counsel did not act deficiently with respect to their investigation and presentation of mitigation evidence. PA 8-11.

Indeed, the record clearly shows that evidence of Perry's family history of mental illness and substance abuse was actually presented to the jury, and was indeed one of the cornerstones of the defense's case. Counsel found Perry's adoption records, unsealed them, investigated Perry's biological background, and presented Perry's mother's history of substance abuse to the jury. 15 R 2992. Counsel also had Dr. Kessner put together a mitigation package that involved speaking at length with Perry's legal parents, biological mother, biological grandfather, and biological brother. *Id.* at 2993. Counsel further called several family members to testify at punishment. *Id.* at 2994. Ultimately, the precise timing of the release of the adoption records was completely irrelevant and in no way impeded counsel from adequately investigating and presenting testimony regarding Perry's family history. And while Perry may be unhappy that counsel's presentation of Perry's mitigating evidence did not lead to a more favorable result, there are "countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Strickland*, 466 U.S. at 689. Given that the manner in which this evidence was presented was a matter of trial strategy informed by an extensive investigation, Perry cannot show that the state court's decision to deny relief was an unreasonable application of the Court's precedent. *See, e.g., Bell v. Cone*, 535 U.S. 685, 699 (2002) (holding that the burden is on the petitioner to do more than just "convince a federal habeas court that, in its independent judgment, the state court

decision applied *Strickland* incorrectly," but instead the petitioner "must show that the [state court] applied *Strickland* to the facts of his case in an objectively unreasonable manner"). Accordingly, reasonable jurists could not debate the resolution of this claim, and certiorari review of this claim should be denied.

C. Reasonable jurists could not debate that counsel did not perform ineffectively by not having Perry tested for bipolar disorder.

Perry further argues that the lower courts erred by holding that counsel did not render ineffective assistance of counsel by not having Perry tested for bipolar disorder. Cert. Pet. at *ii* (Question Presented No. 4), 18-21. He also contends that the court of appeals ignored the mitigating potential of this evidence. *Id.* at 22-25. But as explained by the court of appeals, "Perry twice tested negative for bipolar disorder after being admitted to a mental hospital," and "there was nothing in Perry's record to indicate that he might suffer from bipolar disorder." PA 5, 9.

This Court has admonished that judicial scrutiny of counsel's performance "must be highly deferential," with every effort made to avoid "the distorting effects of hindsight." *Strickland*, 466 U.S. at 689-90; *Rector v. Johnson*, 120 F.3d 551, 563 (5th Cir. 1997). In evaluating counsel's investigation, a court must conduct an objective review measured for "reasonableness under prevailing professional norms," which includes a context-dependent consideration of the challenged conduct as seen "from counsel's perspective at the time." *Wiggins*, 539 U.S. at 523 (quoting *Strickland*, 466 U.S. at 688-89). Here, the evidence at the time did not indicate that Perry suffered from bipolar disorder.

Perry's lead counsel noted in his affidavit to the state court that he "was not aware of any pre-trial diagnosis of [Perry] that [Perry] suffered from Bipolar Disorder." 10 SHCR 1755. Likewise, neither Dr. Kessner nor Dr. Quijano testified that Perry had been diagnosed with bipolar disorder. 26 RR 79-192; 26 RR 237-76. And Dr. Quijano reviewed Perry's medical records during the state habeas proceedings and found no indication that Perry had bipolar disorder. 14 SHCR 2554. In fact, the very first mention of possible bipolar disorder did not occur until after Perry was on death row. PA 9. The Constitution does not require that counsel shop around for an expert that will give them the best possible diagnosis or testimony, nor does it require that counsel anticipate that a new diagnosis might be made long after trial. *Dowthitt v. Johnson*, 230 F.3d 733, 748 (5th Cir. 2000). Reasonable jurists could not debate that the district court was correct in holding that the state court acted reasonably in denying this claim.

D. The lower court's decision is not contrary to *Rompilla*.

Perry further argues that the court of appeals's holding is contrary to this Court's decision in *Rompilla*. Cert. Pet. at *ii* (Question Presented No. 4), 18-21. However, these two cases are easily distinguishable.

In *Rompilla*, the Court addressed a lawyer's obligation "to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial." 545 U.S. at 377. In Rompilla's case, if counsel had investigated readily available evidence, he would have discovered a range of documented mitigation leads including: (1) Rompilla suffered from mental retardation, brain damage, and severe mental health problems; (2) as a

child Rompilla was beaten by his father with fists, straps, belts and sticks; (3) Rompilla's father locked him and his brother in a filthy and excrement-filled wire-mesh dog pen; and (4) Rompilla grew up in a home with no indoor plumbing and was not given proper clothing by his parents. *Rompilla*, 545 U.S. at 381-85, 391-92. The Court concluded that the evidence taken as a whole bore no relation to the evidence presented by counsel at trial, which was made up solely of a "few naked pleas for mercy." *Id.*

Here, counsel did not ignore documented leads, as Rompilla's attorney did. And Perry's counsel's investigation was far more detailed than the one that the Court found inadequate in *Rompilla*. Perry's counsel researched their client's mental and family history, sought expert assistance to evaluate their client, and put on a punishment defense that acknowledged and presented the possible mental illnesses or defects that were raised by their expert. Thus, the court of appeals was correct to observe, "[i]n this case. . . Perry is unable to point to the sort of unreasonable performance that existed in *Rompilla*." PA 11.

E. Perry's assertion that the court of appeals deferred to a nonexistent strategy misstates and misinterprets the court of appeals's decision.

Perry claims that the lower court deferred a nonexistent strategy in evaluating his claim that counsel was tardy in securing Perry's adoption records. Cert. Pet. at *ii-iii* (Question Presented No. 5), 21-22. However, this interpretation of the Fifth Circuit's decision is not borne out by an examination of the opinion. At no point did the court of appeals explain that timing surrounding counsel's procurement of the adoption records was the

product of strategy. PA 8-11. Rather, it merely set out the applicable standard for effective assistance of counsel and observed at the end of its discussion that Perry failed to raise any issue regarding counsel's mitigation strategy. PA 8, 11. Although the court of appeals stated that perhaps counsel could have done "more," overall counsel's investigation was reasonable and "extensive." PA 11.

In conclusion, reasonable jurists could not debate that the district court's holding that Perry failed to meet his burden of proof with respect to his ineffective-assistance-of-counsel claims. The state court's decisions with respect to counsel's effectiveness are neither in conflict with clearly established federal law as determined by this Court nor "based on an unreasonable determination of the facts in light of the evidence." 28 U.S.C. § 2254(d). Certiorari review of Perry's ineffective-assistance-of-counsel claims should be denied.

II. Reasonable Jurists Could Not Debate That the Lower Courts Properly Denied Perry's *Brady* Claim.

Perry alleges that the State withheld that the prosecution struck a deal with former roommate Victor Neal in exchange for his testimony against Perry. Cert. Pet. at 25-29. The Court in *Brady* held that the suppression by the prosecution of evidence favorable to an accused after a request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution. 373 U.S. at 87. Therefore, to establish a *Brady* violation, Perry must show: (1) the evidence at issue was favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) that evidence was suppressed by the State, either willfully or inadvertently; and (3) the evidence was material, *i.e.*,

prejudice ensued from its non-disclosure. *Banks v. Dretke*, 540 U.S. 668, 691 (2004); *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999).

Moreover, "[t]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *United States v. Agurs*, 427 U.S. 97, 109-10 (1978). Instead, the evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *United States v. Bagley*, 473 U.S. 667, 682 (1985). A "reasonable probability" is a probability sufficient to undermine confidence in the outcome of the trial. *Id.*

Here, the lower courts found that the state court reasonably held that there were no inducements offered to Neal and therefore denied relief. PA 11-15. This conclusion is not debatable among jurists of reason, and certiorari review of this claim should be denied as well.

A. Perry's assertion that the court of appeals held that there was no *Brady* violation because there was no immunity agreement between Neal and the State is incorrect.

Perry implies that the court of appeals held that there was no *Brady* violation with respect to Neal's testimony simply because there was no "formal immunity agreement." Cert. Pet. at *iii* (Question Presented 6), 25-26. However, in evaluating this claim, the court of appeals acknowledged that "[t]he State is required to disclose any inducements made to a witness—not just formal immunity agreements or promises." PA 10. Rather, the court of appeals found that prosecutors only

told Neal that he could not be prosecuted because he was not a participant in a crime, and "[i]t is untenable to argue that prosecutors have achieved testimony for their side from an innocent witness by offering to do that which they are required to do, *i.e.* not prosecute." *Id.* Accordingly, it was the court of appeals's opinion that the prosecutors had no disclosure obligation because they had nothing impeaching to disclose—not that the lack of an immunity agreement precluded a finding that there was *Brady* violation.

B. There were no inducements offered to Neal for his testimony and thus nothing to disclose under *Brady*.

Perry asserts that the court of appeals's decision constitutes "slavish deference" to the state court's decision. Cert. Pet. at *iv* (Question Presented No. 8) (citing *Miller-El*, 537 U.S. at 336), 25-26. But the record clearly shows that the prosecution promised nothing to Neal, and there was never any implicit understanding or assurance that Neal would not be prosecuted if he cooperated with the State. At the punishment phase of Perry's trial, Neal testified that he was only present when Perry and Jason broke into a house in Porter, Texas. 24 RR 221. "Jason said it was his aunt's or grandma's house. They had to get some stuff from there, so I got out with them but they started going through the back window and it didn't seem right. So I went back out to the truck and waited." *Id.* at 221. Neal saw them carry out a "[b]ig screen T.V., a video camera, a couple of photo cameras and some CDs." *Id.* at 222. Neither Perry nor Jason implicated Neal in this burglary.

During state habeas review, Montgomery County ADA David Bluestein provided an affidavit to the habeas court explaining that the State had no evidence to prove

that Neal was involved in this burglary or the murders with Perry and Jason. 10 SHCR 1832. Likewise, ADA Robert Bartlett stated in an affidavit that he and ADA Bluestein explained to Neal that he could not be prosecuted for the burglary because "he was not an actual participant" and that "it was not necessary to offer immunity to [Neal] because there was no evidence that he committed the offense of burglary or theft."[11] 10 SHCR 1838-39.

Perry asserts that the court of appeals should have found that Neal was a "lookout" based Neal's testimony during Jason's trial. Cert. Pet. at *iii* (Question Presented No. 7), 26-27. But ADA Bartlett states that "I repeatedly attempted to explain to the Court [in Jason's trial] that the promise not to prosecute [Neal] on the burglary or theft was based on the fact that we could not prosecute him on these charges." 10 SHCR 1838-39.

Thus, it is clear that there was never any *quid pro quo* for Neal's testimony, and therefore no favorable evidence to disclose under *Brady*. Neal was not prosecuted because he could not be charged with a crime—not because he struck a bargain with prosecutors. To the extent that Neal's testimony at Jason's trial or his state court affidavit contests the prosecution's version of events, the state court reasonably decided to believe the prosecution team rather than Neal.[12] Federal courts are

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[11] Montgomery County District Attorney's Investigator Heather Cash also stated in an affidavit that she was present for several meetings between the DA and Neal, and "[a]t no time in my presence was [Neal] made any promises for his testimony or offered immunity from prosecution." 10 SHCR at 1766.

[12] To whatever extent that Perry asserts that Neal understood the State was offering him immunity, the prosecution's

obliged to honor a state court's factual finding unless it constitutes an unreasonable determination in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d)(2). This clearly was not an unreasonable determination of the facts in light of the evidence.

C. Even if the State had a disclosure obligation under *Brady*, the allegedly suppressed evidence was not material.

Perry also asserts that both the state and federal courts failed to address the materiality of this evidence at sentencing and therefore the materiality prong should be evaluated de novo. Cert. Pet. at *iv* (Question Presented 9), 25-26. However, even assuming *arguendo* that a materiality inquiry is germane, there was no reasonable probability of a different result. It is plain that Neal's testimony was not the jury's focus at punishment. Perry confessed to killing to the victim. At punishment, evidence was admitted that Perry further confessed to helping kill two other individuals, including the son of the victim. Perry had a complete absence of remorse; his testimony was unrepentant; and there was overwhelming evidence of prior misconduct presented by the State. *See* Statement of the Case, *supra*. Therefore, under *any* standard of review, it is clear that disclosure of this alleged agreement between Neal and the State would not have raised a reasonable probability of a different result.

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affidavits show that they were unaware that such a misunderstanding existed.

IV. Perry's "Applied Challenge" to Texas's Mitigation Instruction Is Unexhausted and Procedurally Defaulted. Alternatively, It is Meritless.

Perry argues that the prosecution improperly argued in voir dire and closing argument that there must be a nexus between the crime and the mitigating evidence presented. Cert. Pet. at *iv-v* (Questions Presented 10-11), 25-26. (comparing this argument to the now-defunct constitutional relevance test). However, the court of appeals correctly held that this "applied challenge" is unexhausted and procedurally defaulted.

A. This claim was never presented to the state court.

Perry never presented his "applied challenge" to the state court. Indeed, in his petition Perry does not even attempt to dispute this fact. Cert. Pet. at *iv-v* (Questions Presented Nos. 10-11), 29-36. A state prisoner normally must exhaust all available state remedies before he can apply for federal habeas relief. *Nobles v. Johnson*, 127 F.3d 409, 419 (5th Cir. 1997). To exhaust his state court remedies, the petitioner must have fairly presented the substance of his claim to the state courts. *Id.* at 420 (citing *Picard v. Connor*, 404 U.S. 270, 275-76 (1971)). The prisoner does not satisfy the exhaustion requirement if he presents in his federal petition new legal theories or factual claims that he failed previously to present to the state courts. *Id.* (citing *Anderson v. Harless*, 459 U.S. 4, 6-7 (1982)). Where a prisoner fails to exhaust available state remedies and the state court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred, a procedural default occurs. *Id.* (quoting *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991)).

Perry did raise a *Penry*-type claim in his supplemental brief on direct appeal. Appellant's Motion for Leave to File His Supplemental Brief and his Supplemental Brief at 16-22. However, in that supplemental brief Perry only raised a challenge to the facial validity of the statute. *Id.* Never did Perry raise an "applied challenge" or allege that the prosecution had misled the jury into disregarding some of his mitigation evidence. *Id.* Consequently, this claim is unexhausted and procedurally defaulted. 28 U.S.C. §§ 2254(b), (c) (2002); *Vega v. Johnson*, 149 F.3d 354, 362 (5th Cir. 1998); *Nobles*, 127 F.3d at 422 (holding that defaulted claims had yet to be presented to the state courts; determining the claims were unexhausted and procedurally defaulted and concluding that the standard for avoiding a state citation for abuse of the writ could not be satisfied).

B. The Director did not waive the exhaustion defense with respect to Perry's "applied challenge" to Texas's mitigation instruction.

In his petition, Perry does not appear to contest that his "applied challenge" is unexhausted and procedurally defaulted. *See generally* 29-38. Rather, Perry asserts that the Director waived his exhaustion defense in the district court. *Id.* at *v* (Questions Presented Nos. 12-13), 36-39.

In his brief to the district court, Perry alleged the Texas mitigation statute was unconstitutional on its face. 1 R 144-150. He contended that the statute was by its own terms confusing and impermissibly limited the evidence that a juror could consider. *Id.* To illustrate his

point, Perry provided an example[13] from voir dire that he argued demonstrated how the prosecution could use the statutory language to confuse a juror into believing that he could only consider mitigating evidence that has a direct link to the crime. *Id.* at 147-48.

Only in the court of appeals—having apparently conceded the facial validity of the statute—did Perry seek to twist his claim into a challenge to the way that the State characterized and explained the statute to the jury. In his Motion for COA, Perry argued for the first time that the district court misconstrued his claim by limiting its evaluation to the statute's facial validity. Appellant's Motion at 49-55. However, the court of appeals found that:

> In his brief to the district court, Perry brought a facial challenge to Texas's mitigation instruction. Examples from his trial were given to demonstrate the facial invalidity of the instruction. Perry now argues that this also constituted an as-applied challenge. Nothing in his brief, however, gave any indication that Perry was challenging Texas's mitigation instruction as it was applied in his case.

PA 17-18.

As result, the court of appeals held that "[t]he district court made no ruling on the [as-applied] effect of

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[13] Perry argues that this solitary example (contained on one page of a 146-page petition) somehow served to raise this argument in the lower court. If so, it appears that Perry's argument was so subtly-phrased that the Director, the lower court, and the court of appeals all failed to discern it.

the mitigation instruction in this trial because Perry had not argued it" and any "applied challenge" was unexhausted and procedurally defaulted. The court of appeals further noted that Perry had argued in his reply brief that the Director had waived exhaustion, but the court ultimately found that the Director "did not and could not have waived this argument as to the new claims [Perry] now argues." PA 17-18.

The Director does not dispute Perry's assertion that the Director may waive exhaustion. And the Director freely admits that he conceded exhaustion with regard to Perry's challenge to the statute's facial validity in the district court. However, the Director never conceded exhaustion with regard to any "applied challenge" in the district court. Nor could he have—for the simple reason that *Perry's claim was never presented there*.[14] Instead, the Director asserted the defense at the first possible opportunity—when Perry raised it initially on appeal. Consequently, the court of appeals acted properly in finding this claim unexhausted and procedurally defaulted.[15]

C. **In the alternative, this claim is meritless.**

Finally, even if Perry's new "applied challenge" was not unexhausted and procedurally defaulted, it is wholly meritless. Perry's jury received the modern

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[14] PA 15-18 ("Perry did not raise his as-applied challenge before [] the district court;" "Perry did not [] brief this issue to the district court").

[15] In the alternative, the lower court was not obligated to accept the State's waiver of exhaustion, either express or implied. *Graham v. Johnson*, 94 F.3d 958, 970 (5th Cir. 1996). Even if the Director had inadvertently waived this defense, the court of appeals acted correctly in respecting comity by declining to decide this issue.

special issues, which includes a catch-all mitigation instruction. Special Issue Two reads as follows:

> Taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, is there a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed?

4 CR 605. The jury was additionally instructed, in compliance with Texas Code of Criminal Procedure Article 37.071 Section 2(f)(4), that, "[i]n arriving at your answer, you shall consider mitigating evidence to be evidence that a juror might regard as reducing the defendant's moral blameworthiness." 4 CR 601.

The district court evaluated Perry's claim and found that the court of appeals has repeatedly held that "'Texas' definition 'encompasses 'virtually any mitigating evidence.'" 16 R 3010 (citing *Roach v. Quarterman*, 220 Fed. App'x 270, 277 (5th Cir. 2007) (quoting *Beazley v. Johnson*, 242 F.3d 248, 260 (5th Cir. 2001))). The district court further observed that this Court specifically commended the current Texas capital sentencing scheme, calling the new statute "[a] clearly drafted catchall instruction on mitigating evidence" and a model of "brevity and clarity." *Penry v. Johnson* (*"Penry II"*), 532 U.S. 782, 802-803 (2001).

Moreover, Perry's examples from jury voir dire merely show the prosecutor equating personal moral culpability with responsibility for the crime. Cert. Pet. 34-35. This is an accurate definition of culpability, which

generally refers to the degree of one's moral blameworthiness for a criminal act. *See e.g.* Model Penal Code Section 2.02. Further, even if the prosecutor improperly defined the relevant terms, the trial court's instruction clearly states that the jury shall consider "all of the evidence," of which "personal moral culpability" is just one specifically named factor. 4 CR 605. As for Perry's examples from closing argument, they only appear to show the prosecutor contesting the defense's claims that Perry had ADHD, overwhelming genetic limitations, or a severe drug and alcohol problem—not exhorting the jury to disregard evidence if it was not linked to the crime. Cert. Pet. at 34-35. If anything, the prosecutor was simply using the facts of the crime to rebut the defense's assertions. *Id.* Thus, even if Perry's claim were not unexhausted and procedurally defaulted, it would still be without merit.

CONCLUSION

For the foregoing reasons, Perry's petition for certiorari should be denied.

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